

No. 3722

United States
Circuit Court of Appeals
For the Ninth Circuit.

E. VACHINA,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Nevada.

FILED
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U. S. DISTRICT COURT
CLARK

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

Messrs. M. B. MOORE and C. H. McINTOSH,
Reno, Nevada.

For the Plaintiff in Error.

Honorable WM. WOODBURN, United States At-
torney for the District of Nevada, Reno,
Nevada, and Mr. M. A. DISKIN, Assistant
U. S. Attorney for the District of Nevada,
Reno, Nevada.

For the Defendant in Error.

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

E. VACHINA,
Defendant.

**Indictment for Violation of National Prohibition
Act.**

United States of America,
District of Nevada,—ss.

Of the February Term of the District Court of
the United States of America, in and for the Dis-
trict of Nevada, in the year of our Lord, one thou-
sand nine hundred and twenty-one.

The Grand Jurors of the United States of
America, chosen, selected and sworn, within and for
the District of Nevada, in the name and by the au-

thority of the United States of America, upon their oaths, do find and present:

That E. VACHINA, hereinafter called the defendant, heretofore, to wit: On or about the 29th day of December, A. D. 1920, at Reno, County of Washoe, State and District of Nevada and within the jurisdiction of this Court, after the date upon which the 18th amendment to the Constitution of the United States of America went into effect and before the finding of this Indictment, in violation of Section 3, Title II, of the Act of Congress dated October 28, 1919, known as "The National Prohibition Act" had in his possession intoxicating [1*] liquors; said intoxicating liquors containing one-half of one per centum, or more, of alcohol by volume, and being fit for use for beverage purposes;

CONTRARY to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

WM. WOODBURN,
United States Attorney.

Names of witnesses examined before the Grand
Jury on finding the foregoing Indictment:

P. NASH.

[Endorsed]: No. 5396. United States District Court, District of Nevada. The United States of America vs. E. Vachina. Indictment for Violation of the National Prohibition Act. A true bill. Miles E. North, Foreman. Filed this 31st day of March, A. D. 1921. T. J. Edwards, Clerk. By E. O.

*Page-number appearing at foot of page of original certified Transcript of Record.

Patterson, Deputy Clerk. Wm. Woodburn, U. S. Attorney. [2]

In the United States District Court, District of Nevada.

UNITED STATES

vs.

E. VACHINA.

Proceedings Had Before United States Commissioner—January 8, 1920.

BE IT REMEMBERED that the following proceedings were had and testimony introduced on the preliminary hearing of the defendant E. Vachina, on the 8th day of January, A. D. 1920, before Anna M. Warren, U. S. Commissioner:

Appearances: M. A. DISKIN, for United States.
M. B. MOORE, for Defendant.

Mr. MOORE.—I desire to have made part of the record upon the hearing on motion to quash the affidavit filed in this case on the 28th day of December, 1920, taken before U. S. Commissioner Anna M. Warren, and made by P. Nash. I desire to have a copy of this affidavit included in the transcript of this hearing.

United States of America,
District of Nevada,
County of Washoe,—ss.

AFFIDAVIT.

On this 28th day of December, A. D. 1920, before me, Anna M. Warren, a United States Com-

missioner for the District of Nevada, personally appeared P. Nash, who being first duly sworn deposes and says: [3]

That he is and at all times herein mentioned was a Federal Prohibition Enforcement Agent in and for the District of Nevada and as such makes this affidavit and presents the facts, circumstances and conditions hereinafter set forth that heretofore came to the knowledge of and were ascertained by affiant for the purpose of having issued hereon and hereunder a search-warrant, under and pursuant to the provisions of Title II of the National Prohibition Act, respecting the issuance of search-warrants, to search the following described premises, to wit: The Alpine Winery together with all rear rooms, basements, and attic, cupboards, and every portion of said soft drink establishment situated at 116 North Center Street, in the City of Reno, County of Washoe, State of Nevada, Vachina Brothers proprietors; that affiant has knowledge and information that in and upon the aforesaid premises, and since Title II of the said National Prohibition Act went into effect, to wit, after the first day of February, A. D. 1920, intoxicating liquor containing one-half of one percentum of alcohol, or more, by volume was and now is being manufactured, sold, kept, or bartered, for and fit for beverage purposes, in violation of Title II of the said National Prohibition Act and particularly of section 21 of said Title II.

That the facts, circumstances and conditions of which affiant has knowledge, and as ascertained by

affiant are as follows, to wit: Direct information by a certain citizen of Reno, whom affiant has known for several years and whom he considers absolutely credible and reliable, but whose name cannot be stated on this affidavit, that on the 24th day of December, 1920, said informant and a friend purchased alcoholic liquors from the proprietor [4] of said Alpine Winery, said liquor being served and sold from the back room (kitchen) of said soft drink establishment. Said information was given to affiant under oath.

That it will be necessary to search the above mentioned premises in order to secure the said intoxicating liquor and apparatus for the manufacture of same for the United States Government and that it will be impossible to secure the aforesaid intoxicating liquor and apparatus for the manufacture of same without the aid and use of a search-warrant.

WHEREFORE affiant prays that a warrant to enter the above-mentioned premises and there to search for the said intoxicating liquor and apparatus for the manufacture of same be issued pursuant to the statutes in such case made and provided.

(Signed)

P. NASH.

Subscribed and sworn to before me this 28th day of December, 1920.

[Seal]

ANNA M. WARREN,

United States Commissioner.

Mr. MOORE.—I believe it will be admitted that this is the search-warrant issued?

Mr. DISKIN.—Yes.

Testimony of P. Nash, for Defendant.

Testimony of P. NASH, called on the part of defendant, being first duly sworn, testified as follows:

Direct Examination.

Mr. MOORE.—You are the same P. Nash who made the affidavit just presented in evidence?

A. Yes.

Q. Did you at the time this affidavit was made and before the issuance of this search-warrant make any other affidavit or sworn [5] statement other than this affidavit which is presented here?

A. I did.

Q. Was that taken down in writing?

A. It was.

Q. Did it include any other facts than are set out in this affidavit? A. No.

Q. At the time you made this affidavit, Mr. Nash, you had no personal knowledge of any of the statements made here, that is from investigations made by yourself? A. How do you mean?

Q. Had you seen anybody buy anything there?

A. I could not very well, I have never been there myself.

Q. You hadn't been in yourself? A. No.

Q. The only facts presented was what had been told you by some other person?

A. Yes, that is all.

Q. And you didn't bring that person before the commissioner and have him or her, whoever it may

(Testimony of P. Nash.)

be, make the statement under oath to the commissioner?

A. No, I didn't bring him or her before the commissioner.

That is all.

Cross-examination.

Mr. DISKIN.—(Q.) Did you at the time you received this statement from your informant administer an oath to the informant to tell the truth?

A. I did, to tell the truth, the whole truth and nothing but the truth and I took the statement down in writing and asked him to sign it.

Q. And prior to the issuance of the search-warrant did you disclose to the Commissioner the name of your informant? A. I did. [6]

Q. That diagram that appears upon the affidavit for a search-warrant, where did you get the information wherein you set forth the facts on that diagram?

A. It is a diagram made for me by the informant. That is all.

Redirect Examination.

Mr. MOORE.—(Q.) You had been in the place before had you not?

A. Yes, I was in there once.

Q. You knew where the liquor was?

A. No, I didn't know where the liquor was kept.

Q. You knew the condition of affairs, how the rooms were?

A. I was not positive. You see the other time we went in we found practically the same thing as

(Testimony of P. Nash.)

we found this time except the demijohn was on the back porch.

Mr. MOORE.—I move that be stricken out as not responsive.

A. You mean the diagram of the rooms?

Q. Yes.

A. I was there once before. Whilst I could remember the general plan of the rooms I was glad to get the diagram from the informant.

Q. The party whom you have reference to in this affidavit is a citizen of Reno? A. He is.

Q. And was here in town at the time you made this affidavit. A. Yes, I guess he was.

Q. But you did not bring or attempt to bring him before the commissioner and have him make an affidavit? A. No.

That is all.

Mr. MOORE.—I now move that the warrant be quashed.

COMMISSIONER.—The motion is denied. [7]

Mr. MOORE.—I reserve an exception and ask that you certify the record as it is taken to the District Court at Carson.

Testimony of P. Nash, for Plaintiff.

Testimony of P. NASH, called on the part of plaintiff, being first duly sworn, testified as follows:

Direct Examination.

Mr. DISKIN.—(Q.) What is your full name?

A. P. Nash.

Q. What is your business?

(Testimony of P. Nash.)

A. Federal Prohibition Enforcement Agent.

Q. Were you such officer on the 29th day of December, 1920. A. I was.

Q. Do you know the defendant E. Vachina?

A. Yes, sir.

Q. Do you know the premises designated as the Alpine Winery? A. Yes.

Q. Where situated?

A. North Center Street directly opposite the police station.

Q. In what city, town or state?

A. City of Reno, State of Nevada.

Q. Did you have occasion to visit the premises on or about the 29th day of December, 1920?

A. I did.

Q. Who was with you?

A. Agent Brown and Sheehan.

Q. Who did you find in the premises?

A. Found the defendant E. Vachina.

Q. Where was he?

A. In the back room of the soft drink establishment.

Q. Describe the rooms? [8]

A. The bar-room facing Center Street, then there is a vacant room apparently been used for a dining-room, a table in there, I think that is all; then there is a partition and comes this room where we found defendant that has a stove in it and a rack for dishes.

Q. Any one else in there besides the defendant?

A. A newsboy or messenger-boy sitting next to

(Testimony of P. Nash.)

the door, as soon as we entered he left.

Q. What was the defendant doing?

A. Putting the back curtain up, his back was toward the door.

Q. What if anything did you find on the premises at that time

A. The first thing I did was to hand the defendant a copy of the search-warrant as he turned away from the window from putting up the back curtain, told him we were officers to search the premises and Mr. Brown picked up the two bottles.

Q. Did he do that in your presence? A. Yes.

Q. Where did he find the bottles?

A. The jackass was against the table and the demijohn of wine close to the wall right up against the sink.

Q. What kind of a container was the jackass in?

A. In a quart bottle and the wine in a wicker covered demijohn.

Q. How much jackass in the bottle?

A. About two-thirds or three-quarters full.

Q. Did you make an examination of it?

A. I did, I tasted it and it is liquor called jackass. It is good quality. I tasted the wine, it is red wine.

Q. Did defendant make any statement to you at that time? A. None whatever. [9]

Q. You testified it occurred at Reno, Washoe County, Nevada.

A. Yes. I gave the defendant a receipt for the two articles seized.

(Testimony of P. Nash.)

Q. Did you see anything on the table?

A. Saw two or three glasses on this table in the back room.

That is all.

Cross-examination.

Mr. MOORE.—(Q.) There were lots of other dishes there too?

A. Yes, there were other dishes there.

Q. Any fire in the stove.

A. There was a fire in the stove.

Q. What time in the evening was this?

A. Seven o'clock, I think, or thereabouts.

Q. Do you know whether there were any dirty or soiled dishes in the kitchen?

A. I don't know that.

Q. You don't know whether a meal had been served in the large dining-room?

A. It didn't look to me as if any meal had been served.

Q. You don't know?

A. I don't know, I was not there.

Q. At the time you went there you had a search-warrant?

A. Yes, that is the original search-warrant, I left a copy with the defendant.

Q. What date was it you made that search? [10]

A. The 29th, I think.

Q. Prior to the issuance of this search-warrant you had made this affidavit?

A. Yes, that is the affidavit.

Q. That is the only affidavit which you made be-

(Testimony of P. Nash.)

fore the commissioner, or that was made before the issuance of the search-warrant? A. Yes.

Mr. MOORE.—I wish a copy of the affidavit and a copy of the search-warrant, together with the return included in the record.

Q. This is the return you made? A. Yes.

That is all.

Mr. DISKIN.—That is our case.

The search-warrant reads as follows, with the return thereon:

SEARCH-WARRANT.

The President of the United States of America, to the United States Supervising Prohibition Enforcement Agent, His Deputies, or any or either of them, GREETING:

WHEREAS, P. NASH has heretofore, to wit, on the 28th day of December, 1920, filed with me, Anna M. Warren, a United States Commissioner in and for the District of Nevada, at Reno, Nevada, his affidavit in which he states that he is a Federal Prohibition Enforcement Agent acting under the United States Supervising Agent at San Francisco, California; that in and upon those certain premises situated at 116 North Center Street in the City of Reno, County of Washoe, State of Nevada, known as the Alpine Winery, [11] together with all rear rooms, basements, and attics, cupboards and every portion of said soft drink establishment proprietors of said Alpine Winery being Vachina Brothers; that affiant has knowledge and information that there is located and concealed, stored and kept, sold,

possessed and bartered and fit for beverage purposes, in violation of Title II of said National Prohibition Act and particularly in violation of section 21 of said Title II thereof intoxicating liquor containing one-half of one per centum or more of alcohol by volume; that it will be impossible for the United States Government to obtain possession of said intoxicating liquor without a search-warrant to enable the search to be made of the premises hereinabove described, whereupon affiant prays that a search-warrant issue.

NOW, THEREFORE, pursuant to section 25, Title II of the Act of October 28, 1919, known as the National Prohibition Act you are hereby authorized and empowered to enter said premises hereinabove described, in the daytime or in the night-time and thoroughly to search each and every part of said premises for the said intoxicating liquor concealed in violation of the Act of October 28, 1919, and to seize the same and take it into your possession to the end that the same may be dealt with according to law, and hereof to make due return with a written inventory of the property seized by you or any or either of you without delay.

WITNESS my hand this 28th day of December, 1920.

ANNA M. WARREN,

U. S. Commissioner in and for the District of Nevada. [12]

RETURN.

Reno, Nevada, Dec. 30, '20.

Make returns on within warrant as follows:

Searched premises described within on Dec. 29th, 7 P. M., 1920. Seized as evidence one qt. bottle containing J. A. brandy from back room, and one 1 gal. d. j. containing wine. Arrested proprietor, E. Vachina.

I, P. Nash, the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of all property taken by me on the warrant.

(Signed) P. NASH,
Fed. Pro. Agt.

State of Nevada,
County of Washoe,—ss.

I, Anna M. Warren, do hereby certify that the foregoing transcript is a full, true and correct transcript of the testimony taken at the preliminary hearing in the above-entitled action; that the testimony was taken in shorthand and thereafter transcribed by myself.

ANNA M. WARREN,
U. S. Commissioner.

[Endorsed]: U. S. vs. E. Vachina. Proceedings before U. S. Comr. Filed Feby. 4th, 1921. T. J. Edwards, Clerk U. S. Dist. Court, Dist. Nevada.

Before United States Commissioner ANNA M. WARREN, of the United States District Court for the State of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED VACHINI,

Defendant.

Notice of Motion to Quash.

To the Above-named Plaintiff, and WILLIAM WOODBURN, U. S. District Attorney for the District of Nevada:

You, and each of you, will please take notice that on Friday, the 7th day of January, 1921, at the hour of 2 o'clock P. M., or as soon thereafter as counsel can be heard, that the above-named defendant will move the Commissioner, Anna M. Warren, at her office in the Washoe County Bank Building, in the City of Reno, Washoe County, Nevada, to quash, set aside and hold for naught the search-warrant issued by the said Anna M. Warren, as United States Commissioner in and for the District of Nevada, on the 28th day of December, A. D. 1920. That said motion will be made upon the grounds that there was no sufficient affidavit or deposition made, taken or filed with or before said Commissioner showing probable cause of any offence sufficient to warrant the issuance of said search-warrant. That there will be used upon the hearing of said motion the affidavit of P. Nash,

made and filed before the said Anna M. Warren, Commissioner aforesaid, on the 28th day of December, 1920, upon which [14] said search-warrant was issued; also, the oral testimony of the said P. Nash, and all of the files of said cause in said Commissioner's court.

Dated this 6th day of January, 1921.

MOORE & McINTOSH,
Attorneys for the Above-named Defendant.

[Endorsed]: Before U. S. Commissioner Anna M. Warren, of the U. S. District Court for the State of Nevada. United States of America, Plaintiff, vs. Ed Vachini, Defendant. Notice of Motion to Quash. Filed Feby. 4th, 1921. T. J. Edwards, Clerk U. S. Dist. Court, Dist. Nevada. Moore & McIntosh, Attorneys at Law, Reno, Nevada, Attorneys for Defendant. [15]

Before United States Commissioner ANNA M. WARREN, of the United States District Court for the State of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ED VACHINI,
Defendant.

Motion to Quash.

Comes now the defendant above named and moves the Court to quash, set aside and hold for naught the search-warrant issued out of the above-entitled court on the 28th day of December, 1920, against

the premises at No. 116 North Center Street, in the City of Reno, Washoe County, Nevada, known as the "ALPINE WINERY," said premises being occupied by the above-named defendant, on the grounds and for the reasons that no sufficient affidavit and no sufficient deposition or depositions were filed or taken by the said Commissioner before the issuance of said search-warrant showing probable cause for the issuance thereof.

Dated, this 6th day of January, 1921.

MOORE & McINTOSH,

Attorneys for the Above-named Defendant.

[Endorsed]: Before U. S. Commissioner Anna M. Warren, of the U. S. District Court for the State of Nevada. United States of America, Plaintiff, vs. Ed Vachini, Defendant. Motion to Quash. Filed Febry. 4th, 1921. T. J. Edwards, Clerk U. S. Dist. Court, Dist. Nevada. Moore & McIntosh, Attorneys at Law, Reno, Nevada, Attorneys for Defendant. [16]

In the United States District Court, District of Nevada.

UNITED STATES,

Plaintiff,

vs.

ED VACHINA,

Defendant.

Motion to Quash.

Comes now the defendant above named, and renews his motion to quash, set aside and hold for naught the search-warrant issued by Anna M. Warren, one of the Commissioners of the above-entitled court, on the 28th day of December, A. D. 1920, said motion having been made in said Commissioner's Court, and heard on the 8th day of January, A. D. 1921, by the said Anna M. Warren, Commissioner aforesaid.

Dated this 19th day of April, 1921.

MOORE & McINTOSH,
Attorneys for Defendant.

[Endorsed]: No. 5396. In the United States District Court, District of Nevada. United States, Plaintiff, vs. E. Vachina, Defendant. Motion. Filed April 21, 1921. E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [17]

In the United States District Court, District of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
ED VACHINA,
Defendant.

Notice of Motion to Quash.

To the Above-named Plaintiff, and WILLIAM WOODBURN, U. S. District Attorney for the District of Nevada:

You, and each of you, will please take notice that on Tuesday, the 25th day of April, A. D. 1921, at the hour of 10 o'clock, or as soon thereafter as counsel can be heard, at the United States Federal Post Office Building, in Carson City, Nev., in the courtroom of the said above-entitled District Court, in said building, and before the Honorable E. S. Farrington, Judge of said District Court, the above-named defendant will move the Court to quash, set aside and hold for naught the search-warrant issued by Anna M. Warren, a United States Commissioner in and for the District of Nevada, on the 28th day of December, 1920. That said motion will be made and based upon the grounds that there was no sufficient affidavit or deposition made, taken or filed with or before said commissioner, showing probable cause of any offense sufficient to warrant the issuance of said search-warrant. That there will be used upon the hearing of said motion, the files, records and all proceedings had and taken before the said Commissioner, and forwarded by said Commissioner to the Clerk of the [18] said United States District Court; and the oral testimony of P. Nash and H. P. Brown, and of the said William Woodburn, United States District Attorney aforesaid, and the files in said cause now in the office of the said Clerk of the District Court. That at the said time and place,

and upon the grounds and for the reason hereinbefore set forth, and all of them, the defendant will move the Court for the return of all property to the defendant and to the premises, seized by the said P. Nash and his associates from the said premises under the said search-warrant, and for the further reason that the seizure and removal of said property was in violation of defendant's constitutional rights under and by virtue of the 4th Amendment to the Constitution of the United States.

Dated this 19th day of April, 1921.

MOORE & McINTOSH,
Attorneys for Defendant.

[Endorsed]: No. 5396. In the United States District Court, District of Nevada. United States of America, Plaintiff, vs. E. Vachina, Defendant. Notice of Motion to Quash. Filed April 21, 1921. E. O. Patterson, Clerk. Wm. Woodburn, U. S. Atty., Moore & McIntosh, Attorneys at Law, Reno, Nevada. [19]

In the United States District Court, District of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

E. VACHINA,
Defendant.

Motion to Quash.

Comes now the defendant above named, and moves the Court to quash, set aside and hold for

naught the search-warrant issued by Anna M. Warren, one of the Commissioners of the above-entitled court, on the 28th day of December, A. D. 1920, said search-warrant directing a search of the premises at #116 North Center Street, in the City of Reno, Washoe County, Nevada, known as the "ALPINE WINERY," and occupied by the above-named defendant, and moves the Court, further, to direct the return of one bottle containing jackass brandy, and one wicker covered demijohn or bottle containing wine, claimed to have been seized in said premises and taken therefrom by one P. Nash, and is now in the possession of the said P. Nash or in the possession of William Woodburn, Jr., United States District Attorney, which the said William Woodburn, United States District Attorney, intends to use at the trial of this defendant in an indictment now pending against him in this court, said motion being based upon the grounds that the affidavit made and filed in said cause for the issuance of said search-warrant was insufficient, and did not allege facts sufficient from [20] which the Commissioner or magistrate could find or determine that probable cause existed that any offense was being committed in said premises or by said defendant; that said affidavit is based purely on hearsay; that no sworn deposition was made or filed before said Commissioner showing probable cause of any offense sufficient to warrant the issuance of said search-warrant, and that there were not sufficient allegation of facts or circumstances in said affidavit to warrant or justify the Commissioner in issuing a

search-warrant for said premises. That said search-warrant was in violation of the defendant's constitutional rights as guaranteed to him under and by virtue of the 4th amendment to the Constitution of the United States and that said search and seizure of said goods alleged by the said officers to have been taken therefrom is and will be in violation of defendant's constitutional rights guaranteed to him under the 4th Amendment to the Constitution of the United States and under the 5th Amendment to the Constitution of the United States.

Dated this 19th day of April, 1921.

MOORE & McINTOSH,

Attorneys for Defendant.

[Endorsed]: No. 5396. In the United States District Court, District of Nevada. United States, Plaintiff, vs. E. Vachina, Defendant. Filed April 21, 1921. E. O. Patterson, Clerk. Motion to Quash. Wm. Woodburn, U. S. Atty., Moore & McIntosh, Attorneys at Law, Reno, Nevada. [21]

Defendant's Exhibit No. 1.

United States of America,
District of Nevada,
County of Washoe,—ss.

AFFIDAVIT.

On this 28th day of December A. D. 1920, before me, Anna M. Warren, a United States Commissioner for the District of the State of Nevada, personally appeared P. Nash, who being first duly sworn deposes and says:

That he is and at all times herein mentioned was a Federal Prohibition Enforcement Agent in and for the District of Nevada and as such makes this affidavit and presents the facts, circumstances and conditions hereinafter set forth that heretofore came to the knowledge of and were ascertained by affiant for the purpose of having issued hereon and hereunder a search-warrant; under and pursuant to the provisions of Title II of the National Prohibition Act, respecting the issuance of search-warrants, to search the following described premises, to wit: The Alpine Winery, together with all rear rooms, basements, and attics, cupboards, and every portion of said soft drink establishment, situated at 116 North Center Street, in the City of Reno, County of Washoe, State of Nevada, Vachina Brothers proprietors.

That affiant has knowledge and information that in and upon the aforesaid premises, and since Title II of the said National Prohibition Act went into effect, to wit, after the first day of February, A. D. 1920, intoxicating liquor containing one-half of one per centum of alcohol, or more, by volume was and now is being manufactured, sold, kept, or bartered, for and fit for beverage purposes, in violation of said Title II of the said National Prohibition Act and particularly of section 21 of said Title II. [22]

That the facts, circumstances and conditions of which affiant has knowledge, and as ascertained by affiant, are as follows, to wit: Direct information to affiant by a certain citizen of Reno, whom affiant

has known for several years and whom he considers absolutely creditable and reliable, but whose name cannot be stated on this affidavit, that on the day of the 24th of December, 1920, said informant and a friend purchased alcoholic liquors from the proprietor of said Alpine Winery, said liquor being served and sold from the back room (kitchen) of said soft drink establishment. Said information was given to affiant under oath.

That it will be necessary to search the above-mentioned premises in order to secure the said intoxicating liquor and apparatus for the manufacture of same for the United States Government and that it will be impossible to secure the aforesaid intoxicating liquor and apparatus for the manufacture of same without the aid and use of a search-warrant.

WHEREFORE affiant prays that a warrant to enter the above-mentioned premises and there to search for the said intoxicating liquor and apparatus for the manufacture of same be issued pursuant to the statutes in such cases made and provided.

P. NASH.

Subscribed and sworn to before me this 28th day of December, 1920.

[Seal]

ANNA M. WARREN,
United States Commissioner.

[Endorsed]: Filed Feby. 4th, 1921. T. J. Edwards, Clerk U. S. Dist. Court, Dist. Nevada. [23]

SEARCH-WARRANT.

The President of the United States of America,
To the United States Supervising Prohibition
Enforcement Agent, His Deputies, or Any or
Either of Them: GREETING:

WHEREAS, P. NASH has heretofore, to wit, on the 28th day of December, 1920, filed with me, Anna M. Warren, a United States Commissioner in and for the District of Nevada, at Reno, Nevada, his affidavit, in which he states that he is Federal Prohibition Enforcement Agent acting under the United States Supervising Agent at San Francisco, California; that in and upon those certain premises situated at 116 North Center Street in the City of Reno, County of Washoe, State of Nevada, known as the Alpine Winery, together with all rear rooms, basements, and attics, cupboards, and every portion of said soft drink establishment; proprietors of said Alpine Winery being Vachina Brothers; that affiant has knowledge and information that there is located and concealed, stored and kept, sold, possessed and bartered and fit for beverage purposes, in violation of Title II of said National Prohibition Act and particularly in violation of section 21 of said Title II thereof intoxicating liquor containing one-half of one per centum or more of alcohol by volume;

That it will be impossible for the United States Government to obtain possession of said intoxicating liquor without a search-warrant to enable the search to be made of the premises hereinabove de-

scribed, whereupon affiant prays that a search-warrant issue.

NOW, THEREFORE, pursuant to section 25, Title II of the Act of October 28, 1919, known as the National Prohibition Act [24] you are hereby authorized and empowered to enter said premises hereinabove described, in the daytime or in the night-time, and thoroughly to search each and every part of said premises for the said intoxicating liquor concealed in violation of the Act of October 28, 1919, and to seize the same and take it into your possession to the end that the same may be dealt with according to law and hereof to make due return with a written inventory of the property seized by you or any or either of you without delay.

WITNESS my hand this 28th day of December, 1920.

ANNA M. WARREN,

U. S. Commissioner in and for the District of Nevada.

[Endorsed]:

Reno, Nevada, Dec. 30th, '20.

Make returns on within warrant as follows:

Searched premises described within on Dec. 29th, 7 P. M., 1920.

Seized as evidence one qt. bottle containing j. a. brandy from back room, and one gal. d. j. containing wine.

Arrested proprietor, A. Vachina.

I, P. Nash, the officer by whom this warrant was executed, do swear that the above inventory contains

a true and detailed account of all property taken by me on the warrant.

P. NASH,
Fed. Pro. Agt.

Aff. S. Warrant & Sketch. Filed Feby. 4th, 1921.
T. J. Edwards, Clerk U. S. Dist. Court, Dist.
Nevada.

No. 5396. U. S. District Court, District of
Nevada. The United States vs. E. Vachini. Defts.
Ex. 1. Filed May 2, 1921. E. O. Patterson, Clerk.
[25]

In the District Court of the United States for the
District of Nevada.

No. 5396.

THE UNITED STATES

vs.

E. VACHINA.

Verdict.

We, the jury in the above-entitled cause, find the
defendant guilty as charged in the indictment.

Dated May 7th, 1921.

G. B. SPRADLING,
Foreman.

[Endorsed]: No. 5396. U. S. District Court,
District of Nevada. The United States vs. E.
Vachina. Verdict. Filed May 7th, 1921. E. O.
Patterson, Clerk. [26]

INDICTMENT FOR VIOL. NATIONAL PROHIBITION ACT.

No. 5396.

THE UNITED STATES

vs.

E. VACHINA.

Minutes of Court — March 31, 1921 — Order for Issuance of Capias.

The Grand Jury impaneled in and by this Court having this day presented a true bill of indictment in this case, it is ordered that a capias issue herein returnable forthwith, and that, when apprehended, the defendant may be admitted to bail upon giving a good and sufficient bond in the sum of \$1,000.00.
[27]

Minutes of Court—April 2, 1921—Arraignment.

INDICTMENT FOR VIOLATION OF
NATIONAL PROHIBITION ACT.

(No. 5396.)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. VACHINA,

Defendant.

This defendant appeared this day with his attorney, Mr. M. B. Moore, and was duly arraigned upon the said indictment as provided by law. He

declared his true name to be E. Vachina and pleaded not guilty as charged in the indictment.

**Minutes of Court—April 4, 1921—Order Setting
Time of Trial.**

**INDICTMENT FOR VIOL. NATIONAL PRO-
HIBITION ACT.**

(No. 5396.)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. VACHINA,

Defendant.

Upon motion of Mr. Woodburn, U. S. Attorney, it is ordered that the trial of this case be, and the same is hereby, set for Wednesday, May 4th, next, to follow No. 5374. [28]

**Minutes of Court — May 2, 1921 — Petition for
Return of Property and Motion to Quash.**

**INDICTMENT FOR VIOL. NATIONAL PRO-
HIBITION ACT.**

(No. 5396.)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. VACHINA,

Defendant.

Mr. M. B. Moore, attorney for the defendant herein, presented, read and argued in support of his petition for the return of property and his motion to quash; during his argument he presented the affidavit for and the search-warrant used at the time of seizure; same was admitted and ordered marked Defts. Ex. No. 1. Mr. M. A. Diskin, Assistant U. S. Attorney, argued in opposition to the petition and motion. At the conclusion of the arguments the matters were ordered submitted.

**Minutes of Court—May 3, 1921—Order Denying
Petition for Return of Property and Motion to
Quash.**

**INDICTMENT FOR VIOL. NATIONAL PRO-
HIBITION ACT.**

(No. 5396.)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. VACHINA,

Defendant.

Ordered that the petition for the return of certain seized property and the motion to quash the search-warrant be, and the same are hereby, denied. To which ruling Mr. M. B. Moore, attorney for defendant, asks and is granted the benefit of an exception.

Minutes of Court—May 7, 1921—Trial.

INDICTMENT FOR VIOL. NATIONAL PROHIBITION ACT.

(No. 5396.)

THE UNITED STATES

vs.

E. VACHINA.

This cause coming on regularly for trial this day, Mr. M. A. Diskin, Assistant U. S. Attorney, appeared on behalf of the plaintiff; Mr. M. B. Moore for defendant, who was also present, and who entered his plea of not guilty, at this time. The following named jurors were accepted by the parties and duly sworn to try the issue, to wit: J. T. Brady, E. H. Bath, Walter G. I. Haugner, Alfred M. Smith, Geo. J. Robsen, John Cosser, Wm. Byers, Clarence W. Henningsen, Geo. B. Spradling, E. M. Sullivan, Henry P. Karge and Clarence Reudy. The indictment was read to the jury by the clerk and the plea of the defendant stated. Mr. Diskin waived opening statement on behalf of plaintiff. The following named witnesses were each duly sworn and testified in support of the indictment, viz: H. P. Brown, P. Nash and S. C. Dinsmore; during this testimony plaintiff introduced in evidence, under objection and exception, by defendant, 1 one-gallon demijohn and contents, ordered admitted, filed and marked "Plff's Ex. No. 1," also 1 bottle and contents ordered ad-

mitted, filed and marked "Plff's Ex. No. 2." Plaintiff rests. No testimony was offered on the part of defendant. Mr. Diskin made his opening argument on the part of plaintiff, and all argument was waived by defendant, and the jury having been first instructed by the Court, to which instructions no exceptions were taken, retired in charge of the marshal to deliberate on the case and later returned into court with the following verdict, viz: "In the District Court of the United States for the District of Nevada. The United States vs. E. Vachina. No. 5396. We, the jury in the [30] above-entitled cause, find the defendant guilty as charged in the indictment. Dated May 7th, 1921. G. B. Spradling, Foreman"—and so they all say. Thereupon the Court ordered the defendant to appear for sentence on Tuesday, the 17th instant, at ten o'clock A. M.

**Minutes of Court — May 13, 1921 — Order
Continuing Passing of Sentence.**

INDICTMENT FOR VIOL. NATIONAL PRO-
HIBITION ACT.

(No. 5396.)

THE UNITED STATES

vs.

E. VACHINA.

Upon motion of Mr. M. B. Moore, consented to by the U. S. Attorney, it is ordered that the passing

of sentence in this case be, and the same is hereby, continued until the 27th instant at ten o'clock A. M.

Minutes of Court—May 27, 1921—Sentence and Order Allowing Writ of Error.

INDICTMENT FOR VIOL. NATIONAL PROHIBITION ACT.

(No. 5396.)

THE UNITED STATES

vs.

E. VACHINA.

This being the time heretofore appointed for passing sentence in this case, Mr. Wm. Woodburn, U. S. Attorney, appeared on the part of the plaintiff; Mr. M. B. Moore, for defendant, who was also present. Mr. Moore presents his motion for a new trial, which was denied by the Court and an exception taken by counsel. Therefore the Court pronounced judgment as follows: ORDERED that the defendant pay to the United States a fine of Five Hundred Dollars [31] and that he stand committed to the care of the marshal until the fine and costs incurred herein are paid.

ORDER ALLOWING WRIT OF ERROR.

On this 27th day of May, A. D. 1921, came the defendant, E. Vachina, by his attorneys, Messrs. Moore & McIntosh, and filed herein and presented to the Court his petition praying for the allowance of a writ of error and assignment of errors intended to be used by him, praying also that a transcript of

the record, testimony, exhibits, stipulations, proceedings and papers, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; and that such other and further proceedings may be had as may be proper in the premises. In consideration whereof, the Court allows a writ of error, upon the defendant, E. Vachina, giving a bond according to law in the sum of Two Thousand Dollars (\$2,000.00), which shall operate as a supersedeas bond, and that upon the accepting, filing and approval of said bond, the said defendant shall be and he is hereby ordered to be released from custody.

Minutes of Court—June 25, 1921—Order Extending Time to File Papers in U. S. C. C. A.

VIOLATION OF NATIONAL PROHIBITION ACT.

(No. 5396.)

THE UNITED STATES

vs.

E. VACHINA.

Good cause appearing therefor, it is ORDERED that the defendant herein be, and he is hereby, granted thirty days from and after this date within which to file his record on appeal in the United States Circuit Court of Appeals. [32]

In the District Court of the United States for the
District of Nevada.

May Term, 1921.

Honorable E. S. FARRINGTON, Judge.

VIOLATION OF NATIONAL PROHIBITION
ACT.

No. 5396.

UNITED STATES OF AMERICA

vs.

E. VACHINA.

Judgment.

This being the time heretofore appointed for passing sentence in this case, the Court pronounced judgment as follows, addressing the defendant:

You, E. Vachina, have been indicted by the Grand Jury, impaneled in and by this court, for the crime of violating the National Prohibition Act by having in your possession intoxicating liquors; said liquors containing one-half of one per centum, or more, of alcohol by volume, and being fit for use for beverage purposes; said crime having been committed on the 29th day of December, 1920, at Reno, Washoe County, State and District of Nevada, and within the jurisdiction of this court. You were duly arraigned upon that indictment, as required by law, and on being called upon to plead thereto you pleaded not guilty. At a subsequent day you were placed on trial, by a jury of your own selection, and

by the verdict of that jury you were found guilty as charged in the indictment.

The defendant was then asked if he had any legal cause to show why the judgment of the Court should not now be pronounced against him. To which he replied that he had not.

In consideration of the law and the premises, it is hereby ORDERED AND ADJUDGED that you pay to the United States a fine of Five Hundred (\$500.00) Dollars and costs, and that you stand committed to the care of the marshal until the said fine and costs, taxed at \$—, are paid.

Dated and entered, May 27, 1921.

Attest: E. O. PATTERSON,

Clerk. [33]

In the United States District Court for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. VACHINA,

Defendant.

Praeipce for Transcript of Record.

To E. O. Patterson, Clerk U. S. District Court,
Carson City, Nev.

We hearby request that you have prepared for us copies of the records in the case of the United States of America vs. E. Vachina, as follows:

1. Copies of proceedings before the United States Commissioner, Anna M. Warren, including:

- (a) Affidavit for search-warrant.
- (b) Search-warrant.
- (c) Notice of motion to quash search-warrant.
- (d) Motion to quash search-warrant.
- (e) Copy of all testimony taken before said Anna M. Warren, certified up to the District Court on said motion.
- (f) Copy of order of Commissioner ruling upon said motion.
- (g) Copy of any other papers or proceedings not included in the above had or taken before the said Commissioner.

2. Copy of motion made and filed in the United States District Court for the District of Nevada, renewing in said Court the motion made before the Commissioner.

- (a) Copy of notice of motion for the return of property taken under search-warrant.
[34]
- (b) Copy of motion for the return of property made and filed in said cause in said U. S. District Court.
- (c) Copy of minutes of clerk of court showing the Court's ruling upon all motions and objections.
- (d) Copy of indictment.
- (e) Complete transcript of testimony and notes taken by stenographer in said cause.
- (f) Copy of verdict of jury.
- (g) Copy of motion for new trial.
- (h) Copy of petition for writ of error.
- (i) Copy of order allowing writ of error.

- (j) Copy of assignment of errors.
- (k) Copy of citation.
- (l) Copy of supersedeas bond.
- (m) Copy of cost bond.

MOORE & McINTOSH,
Attorneys for Defendant.

[Endorsed]: No. 5396. In the United States District Court for the District of Nevada. United States of America, Plaintiff, vs. E. Vachina, Defendant. Praecipe. Filed June 11, 1921. E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [35]

In the District Court of the United States, in and
for the District of Nevada.

No. 5396.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. VACHINA,

Defendant.

Motion for New Trial.

Comes now the defendant named above and moves the Court that a new trial be granted for the following reasons, and on the following grounds, to wit:

1st. That the Court erred in its decision upon questions of law arising during the course of the trial.

2d. That the verdict of the jury is contrary to law.

MOORE & McINTOSH,
Attorneys for Defendant.

[Endorsed]: No. 5396. In the District Court of the United States in and for the District of Nevada. United States of America, Plaintiff, vs. E. Vachina, Defendant. Motion for New Trial. Filed May 27, 1921. E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [36]

In the United States District Court for the District of Nevada.

No. 5396.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
E. VACHINA,
Defendant.

Assignment of Errors.

Comes now the defendant above named, E. Vachina, and files the following assignment of errors upon which he will rely upon his prosecution of the writ of error in the above-entitled cause from the judgment made and entered by this Honorable Court on the 27th day of May, A. D. 1921.

I.

That the United States District Court for the District of Nevada erred in denying defendant's

motion for new trial made in the above-entitled court and cause on the 27th day of May, 1921, and before the judgment of sentence was pronounced.

II.

That the said Court erred in overruling defendant's objection to the introduction of testimony, made after the jury was impaneled and sworn to try said cause, and before any testimony as to the facts was introduced at said trial.

III.

That the said Court erred in overruling defendant's objection [37] to the admission of the testimony of the witness H. P. Brown, as to what he saw, found and did under the search-warrant referred to in the motion for the return of property made and filed in said cause before the date on which said cause came to trial, said testimony referred to, with questions and answers as follows, to wit:

Q. What, if anything, did you find, Mr. Brown?

Mr. MOORE.—I object to what this witness may have found, or what he saw, or what he did, in these premises at that time, basing my objection on the general grounds laid down in my first objection to the introduction of any testimony.

The COURT.—It will be the same ruling, and you may have the same exception.

Mr. DISKIN.—Proceed, Mr. Brown.

A. We found a demijohn containing what we

call claret wine, and a quart bottle called jack-ass brandy.

Q. And where did you find these two articles?

A. In the kitchen underneath the table.

Q. Where was the defendant?

A. The defendant was in the same room, putting a curtain up to the window.

Q. Was there any other person there outside of the defendant?

A. There was one person when we went in there, eating a sandwich.

Q. In the kitchen? A. Yes, sir.

Q. Do you know who it was?

A. It was a messenger-boy, I don't know his name.

Q. Describe the interior of that place, Mr. Brown. [38]

A. Well, there is a bar-room in front, then a dining-room, and then a kitchen, all straight ahead, all joined together.

Q. Do you know whether or not the public is served meals there? A. I do not know.

Q. Do you know whether or not Mr. Vachina lived there? A. No, I do not.

Q. This was a kitchen, was it?

A. Yes, sir.

Q. Did you see any other member of the household around there?

A. Not anyone, only out in the bar-room.

Q. What kind of a dining-room was this?

A. It is a very large dining-room, with

chairs, and a big, long table, appeared to be set with vinegar bottle, and such as that, in the center of the table, and sugar-bowl.

Q. Do you know whether it is a public or private dining-room?

A. I don't know; I never did see anyone eating in there; on my two occasions of visiting there I never did see anyone eating in that dining-room.

Q. And this kitchen you have described is right off the dining-room? A. Yes, sir.

Q. What did you do with the articles that you found there, Mr. Brown?

A. Took them up to the office of the chief of police, and sealed them up, and then handed them over to the chemist.

Q. Did you take them from the defendant's possession at that time? A. Yes, sir.

Q. Will you examine this bottle and its contents? (Hands to witness.)

A. That is the label that I put on that bottle.

Q. Is that the bottle which you obtained from the possession of the defendant?

A. Yes, sir. [39]

Q. How much liquid was in that bottle at that time?

A. Oh, probably a couple more inches than what is in it now.

Q. How much would you say is in it now?

A. Half full.

Q. Did you make any examination of it at that time?

A. I didn't, no, just smelled it, that is all, at the time I found it.

Q. Now, you say you found what you thought was claret wine? A. Yes, sir.

Q. Will you examine this demijohn, please. (Hands to witness.)

A. That is the demijohn that I found underneath the table.

Q. Was there any substance or liquid in it at that time? A. Yes, sir.

Q. Did you make an examination of it?

A. Just by smelling, is all.

Q. What did you determine?

A. Claret wine, I should say it was.

Q. And both of these containers were turned over by you to Professor Dinsmore?

A. Yes, sir.

Q. Were they in your custody from the time you seized them until you turned them over to Professor Dinsmore? A. Yes.

Q. Did you do anything to the substance contained in these two containers?

A. I did not.

Mr. DISKIN.—We offer in evidence the bottle and its contents and the demijohn and its contents.

Mr. MOORE.—We object, if the Court please, on the grounds heretofore stated.

The COURT.—It will be the same ruling

and the same exception. (The bottle is marked Plaintiff's Exhibit No. 1 and the demijohn, [40] Plaintiff's Exhibit No. 2.)

Mr. DISKIN.—(Q.) What you have testified occurred where, Mr. Brown?

A. Occurred in Reno, Washoe County, Nevada.

Mr. DISKIN.—Cross-examine.

IV.

That the said Court erred in overruling defendant's objection to the testimony of P. Nash as to what he saw, found and did under the search-warrant referred to in the motion for the return of property made and filed in said cause before the date on which the said cause came to trial, said testimony referred to with questions and answers, as follows:

Q. What was the defendant doing—you mean Vachina?

Mr. MOORE.—I object to any testimony as to what the defendant was doing, or what this witness saw or did at that time, basing my objection on the grounds heretofore stated.

The COURT.—Same ruling and exception.

WITNESS.—The defendant was in the act—had his back turned to us—was in the act of raising a shade, or putting a shade up on the back window, some sort of a covering for the back window, and he didn't know we were in the building at all, I do not believe, until I touched him on the leg, I think it was, or some

part of his body, and told him we had a warrant to make a search.

Mr. DISKIN.—(Q.) What did you do thereafter?

A. Took him across to the police station.

Q. What did you do in the building—did you look for anything more in the building?

A. Didn't look for any more than we found.

Q. I am trying to find out what you found.

A. Oh, yes. I had turned around, and the defendant had [41] turned around, and Mr. Brown had these two containers of what proved to be liquor in one and wine in the other.

Q. Where were they found?

A. Underneath this center table—I guess you would call it a center table; it had a rack on it, a long table in the center of the kitchen.

Q. Did you make any examination of the contents of the bottle at that time?

A. Yes, sir.

Q. What examination did you make?

A. I tasted it.

Q. Are you familiar with the taste of alcohol? A. Yes, sir.

Q. Can you say that the bottle contained alcohol?

A. I can. I would call it jackass brandy.

Q. How about the demijohn?

A. The demijohn had a good deal of wine, some sort of red wine in it.

Q. Will you describe the interior of the place to the Court and jury?

A. Entering from Center Street you come into the bar-room proper; there is a little office directly next to the Center Street end of the bar, but the doorway is to the right of the office going in; you pass through this bar-room, which is a long room with tables and chairs, then you go into a room which I presume had been a dining room; at this time it was empty.

Q. Empty?

A. Yes, sir. I think there were tables there, but I didn't see any dishes or signs of being a dining-room, but from its appearance, I judge if this had been a restaurant this would have been the dining-room of the property; pass through it and into the kitchen, as I remember.

[42]

Q. Was the kitchen furnished?

A. Yes, sir; it had a stove in it.

Q. Anything else?

A. Chairs, sink, table; I didn't notice any supplies of any kind; we didn't make any search to speak of at this time. My recollection is I saw some dishes there too.

Mr. DISKIN.—Cross-examine.

V.

That the said Court erred in overruling the motion of defendant to strike the testimony from the record of the witness Brown and Nash, said motion being as follows, to wit:

Mr. MOORE.—Now, if the Court please, I move the Court to strike from the record the testimony of Mr. Nash and of Mr. Brown rela-

tive to what they did on the evening as detailed by them; also all evidence as to what they found on that evening in the premises described by them, for the reason and on the grounds that it now appears from their testimony and the records of this court, that they were operating under a search-warrant which was invalid, it having been issued upon an affidavit, which affidavit was insufficient, and that their actions thereunder were in violation of the constitutional rights of the defendant, as provided by the Fourth Amendment of the Constitution; and that the introduction of such testimony is in violation of the Constitutional rights of the defendant as provided under the Fifth Amendment to the Constitution.

The COURT.—It will be the same ruling and the same exception.

VI.

That the said Court erred in overruling the objection of [43] the defendant to the question propounded to the witness S. C. Dinsmore, which question is as follows:

Q. What did your examination disclose as to the alcoholic contents of the same?

VII.

That the said Court erred in overruling defendant's motion made in said cause in which the defendant renewed the motion made before the Commissioner, Anna M. Warren, to quash, set aside and hold for naught the search-warrant issued by Anna

M. Warren on the 28th day of December, A. D. 1920.

VIII.

That the said Court erred in overruling and denying defendant's motion made in this cause to quash the search-warrant issued by Anna M. Warren, a United States Commissioner in and for the District of Nevada, on the 28th day of December, 1920, and for the return to the defendant of the property taken under said search-warrant.

BY REASON WHEREOF, plaintiff in error prays that the judgment aforesaid be reversed and the cause remanded to the trial court with instructions to the trial court to quash the search-warrant in said action, and for such other and further proceedings as may be proper in the premises.

Respectfully submitted.

MOORE & McINTOSH,
Attorneys for Defendant.

[Endorsed]: No. 5396. In the United States District Court for the District of Nevada. United States of America, Plaintiff, vs. E. Vachina, Defendant. Assignment of Errors. Filed May 27th, 1921. E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [44]

In the United States District Court for the District
of Nevada.

No. 5396.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. VACHINA,

Defendant.

Petition for Writ of Error.

To the Honorable E. S. FARRINGTON, Judge of
the District Court of the United States, for
the District of Nevada.

Now comes E. Vachina, the defendant in the
above-entitled cause, and feeling himself aggrieved
by the verdict of the jury and the judgment of the
District Court of the United States for the District
of Nevada, made and entered on the 27th day of
May, A. D. 1921, hereby petitions for an order
allowing him, said defendant, to prosecute a writ
of error to the United States Circuit Court of Ap-
peals of the Ninth Circuit from the District Court
of the United States for the District of Nevada,
and also prays the court that a transcript of the
record, testimony, exhibits, stipulation, proceedings
and papers, duly authenticated, may be prepared
and sent to the United States Circuit Court of Ap-
peals for the Ninth Circuit, and that said writ of
error may be made a supersedeas and that your
petitioner be released on bail in an amount to be

fixed by the Judge of said District Court pending the final disposition of said writ of error. [45]

Assignment of errors is filed with this petition.

E. VACHINI.

MOORE & McINTOSH,

His Attorneys.

[Endorsed]: No. 5396. In the United States District Court for the District of Nevada. United States of America, Plaintiff, vs. E. Vachina, Defendant. Petition for Writ of Error. Filed May 27th, 1921. E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [46]

In the United States District Court for the District of Nevada.

No. 5396.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. VACHINA,

Defendant.

Order Allowing Writ of Error.

On this 27th day of May, A. D. 1921, came the defendant, E. Vachina, by his attorneys, Messrs. Moore & McIntosh, and filed herein and presented to the Court his petition praying for the allowance of a writ of error and assignment of errors intended to be used by him, praying also that a transcript of the record, testimony, exhibits, stipula-

tions, proceedings and papers, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; and that such other and further proceedings may be had as may be proper in the premises.

IN CONSIDERATION WHEREOF, the Court allows a writ of error, upon the defendant, E. Vachina, giving a bond according to law in the sum of Two Thousand Dollars (\$2,000.00), which shall operate as a supersedeas bond, and that upon the accepting, filing and approval of said bond, the said defendant shall be and he is hereby ordered to be released from custody.

Done in open court this 27th day of May, A. D. 1921.

E. S. FARRINGTON,
District Judge. [47]

[Endorsed]: No. 5396. In the United States District Court for the District of Nevada. United States of America, Plaintiff, vs. E. Vachina, Defendant. Order Allowing Writ of Error. Filed May 27th, 1921. E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [48]

In the United States District Court for the District
of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. VACHINA,

Defendant.

Bail Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That I, E. Vachina, of the County of Washoe, State of Nevada, as principal, and Joseph Pincolini and Dante Pincolini, of the County of Washoe, State of Nevada, as sureties, are held and firmly bound unto the United States of America, in the full and just sum of Two Thousand Dollars (\$2,000.00) to be paid to the United States of America, to which payment well and truly made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

SEALED with our seals and dated this 27th day of May, in the year of our Lord one thousand nine hundred and twenty-one.

WHEREAS, lately on the 27th day of May, A. D. 1921, at a term of the District Court of the United States for the District of Nevada, in a cause pending in said court between the United States of America, plaintiff, and E. Vachina, defendant, a judgment and sentence was rendered against said defendant as follows, to wit:

The said E. Vachina to be fined in the sum of Five Hundred [49] Dollars (\$500.00) together with costs of suit.

WHEREAS the said E. Vachina obtained a Writ of Error from the United States Circuit Court of Appeals for the Ninth Circuit of the said United States District Court for the District of Nevada, to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United

States of America to be and appear in the said court 30 days from and after the date thereof, which citation has been fully served.

Now, the condition of said obligation is such, that if the said E. Vachina shall prosecute said writ of error to effect, and shall appear in person in the United States Circuit Court of Appeals for the Ninth Circuit, when said cause is reached for argument or when required by law or rule of said court, and from day to day thereafter in said court until such cause shall be finally disposed of, and shall abide by and obey the judgment and all orders made by the said Court of Appeals, in said cause, and shall surrender himself in execution of the judgment and sentence appealed from, as said Court may direct, if the judgment and sentence against him shall be affirmed, and if he shall appear for trial in the District Court of the United States for the District of Nevada, on such day or days as may be appointed for a retrial by said District Court and abide by and obey all orders of said court, provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals, then the above obligation to be [50] void; otherwise to remain in full force, virtue and effect.

ED. VACHINA, (Seal)
Principal.

JOSEPH PINCOLINI, (Seal)
Surety.

DANTE PINCOLINI, (Seal)
Surety.

State of Nevada,
County of Washoe,—ss.

Joseph Pincolini and Dante Pincolini, sureties on the annexed foregoing undertaking, being first duly sworn, each for himself and not one for the other deposes and says: That he is a resident and freeholder within the County of Washoe, State of Nevada; and that he is worth the sum of Two Thousand Dollars (\$2000.00) over and above all his just debts and liabilities, in property not exempt from execution.

JOSEPH PINCOLINI.
DANTE PINCOLINI.

Subscribed and sworn to before me this 27th day of May, 1921.

[Seal] ANNA M. WARREN,
United States Commissioner for the District of Nevada.

[Endorsed]: No. 5396. In the United States District Court for the District of Nevada. United States of America, Plaintiff, vs. E. Vachina, Defendant. Bail Bond on Writ of Error. Filed May 31, 1921. T. O. Patterson, Clerk. Approved 5/27/21. Wm. Woodburn, U. S. Attorney. Approved 5/31, 1921. E. S. Farrington. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [51]

In the United States District Court for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. VACHINA,

Defendant.

Bond on Writ of Error.

WHEREAS the defendant in the above-entitled action has sued out a writ of error through the United States Circuit Court of Appeals of the Ninth Circuit to the said United States District Court for the District of Nevada, from a judgment made and entered against him in said above-entitled cause in said United States District Court for the District of Nevada on the 27th day of May, A. D. 1921, or thereabouts; and

WHEREAS the said defendant by an order of Court heretofore duly made and entered is required to enter into a bond in the sum of Five Hundred Dollars (\$500.00) to guarantee the payment of all costs in said cause;

NOW, THEREFORE, in consideration of the premises and of the suing out of said writ of error to the said Court of Appeals for the Ninth District of the United States, we, the undersigned, residents of the county of Washoe, State of Nevada, do hereby jointly and severally undertake and promise on the part of the said E. Vachina, that the said

person will pay all damages and costs which may be awarded against him on account of the said [52] writ of error or on the dismissal thereof, not exceeding the sum of Five Hundred Dollars (\$500.00), in which amount we acknowledge ourselves jointly and severally bound.

WITNESS our signature this ——— day of June, A. D. 1921.

JOSEPH PINCOLINI.

E. PINCOLINI.

State of Nevada,
County of Washoe,—ss.

Joseph Picolini and E. Picolini, each for himself and not one for the other, being first duly sworn, deposes and says: That he is a resident and householder of the County of Washoe, State of Nevada, and is the same identical person who signed the above and foregoing bond and undertaking; and that he is worth the sum of One Thousand Dollars (\$1000.00) over and above all indebtedness and in property subject to execution.

JOSEPH PINCOLINI.

E. PINCOLINI.

Subscribed and sworn to before me this 17th day of June, A. D. 1921.

[Seal]

M. B. MOORE,
Notary Public in and for Washoe County, State
of Nevada.

My commission expires April 23, 1923.

[Endorsed]: No. 5396. In the United States District Court for the District of Nevada. United States of America, Plaintiff, vs. E. Vachina, Defendant. Bond. Within undertaking approved June 21, 1921. E. S. Farrington, Dist. Judge. Filed June 21, 1921. E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [53]

In the District Court of the United States, in and for the District of Nevada.

No. 5396.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. VACHINA,

Defendant.

Testimony.

This case came on for trial in the above-entitled court on Saturday, May 7th, 1921, at 1:30 o'clock P. M. of said day, before the Honorable E. S. Farrington, Judge of said court, and a jury, a jury having been duly and regularly impaneled and sworn to try said case;

Mr. M. A. Diskin, Assistant United States Attorney, appearing as attorney for plaintiff, and Messrs. Moore & McIntosh appearing as attorneys for defendant.

Whereupon, after the reading of the indictment

by the Clerk, the following proceedings were had and testimony introduced: [54]

Mr. MOORE.—If the Court please, I object to the introduction of any testimony in this case which goes to what the officers found and what they did under a certain search-warrant issued out of the Commissioner's court, which is a part of the files and records in this case, on the 28th day of December, 1920, and anything that they did or saw in the premises described in that search-warrant, or any testimony as to what was seized, if anything, there by the officer serving the same, on the grounds that the search-warrant was insufficient and void, for the reason that no proper and sufficient affidavit had been made or filed before the Commissioner, nor was any other sufficient testimony taken to warrant the issuance of the search-warrant under which the officers operated, or to show that probable cause existed that there was an offense being committed there in violation of the Prohibition Act, or any other law of the United States; or that this defendant had or was committing any offense, on the grounds that the search and seizure was in violation of his constitutional rights, as provided under the Fourth Amendment to the Constitution of the United States; and that the use and introduction of any testimony so secured would be in violation of his constitutional right, as provided in the Fifth Amendment of the Constitution of the United States; basing the objection on the proceedings heretofore had, and the files in this case.

The COURT.—The objection will be overruled.

Mr. MOORE.—Give us the benefit of an exception.

The COURT.—The exception will be noted. [55]

Testimony of H. P. Brown, for the Government.

H. P. BROWN, called as a witness on behalf of the Government, after being sworn, testified as follows:

Direct Examination by Mr. DISKIN.

Q. Your name is H. P. Brown?

A. Yes, sir.

Q. You are a prohibition enforcement agent?

A. Yes, sir.

Q. And were you such officer on the 29th of December, 1920? A. Yes, sir.

Q. Do you know the defendant in this case, E. Vachina? A. I do.

Q. Do you know where his place of business was on the 29th of December, 1920? A. Yes, sir.

Q. Where was it?

A. Reno, Nevada; the name of the place was the Alpine Winery.

Q. Did you have occasion to enter the premises of the Alpine Winery kept by the defendant on the 29th of December, 1920? A. I did.

Q. Who was with you at the time?

A. Mr. Nash and Mr. Sheehan.

Q. How did you enter the place, by what way?

A. We entered from the back way.

(Testimony of H. P. Brown.)

Q. What, if anything, did you find, Mr. Brown?

Mr. MOORE.—I object to what this witness may have found, or what he saw, or what he did, in these premises at that time, basing my objection on the general grounds laid down in my first objection to the introduction of any testimony.

The COURT.—It will be the same ruling, and you may have the same exception.

Mr. DISKIN.—Proceed, Mr. Brown. [56]

A. We found a demijohn containing what we call claret wine, and a quart bottle called jackass brandy.

Q. And where did you find these two articles?

A. In the kitchen underneath the table.

Q. Where was the defendant?

A. The defendant was in the same room, putting a curtain up to the window.

Q. Was there any other person there outside of the defendant?

A. There was one person when we went in there, eating a sandwich.

Q. In the kitchen? A. Yes, sir.

Q. Do you know who it was?

A. It was a messenger-boy, I don't know his name.

Q. Describe the interior of that place, Mr. Brown.

A. Well, there is a bar-room in front, then a dining-room, and then a kitchen, all straight ahead, all joined together.

Q. Do you know whether or not the public is

(Testimony of H. P. Brown.)

served meals there? A. I do not know.

Q. Do you know whether or not Mr. Vachina lived there? A. No, I do not.

Q. This was a kitchen, was it? A. Yes, sir.

Q. Did you see any other member of the household around there?

A. Not any one, only out in the bar-room.

Q. What kind of a dining-room was this?

A. It is a very large dining-room, with chairs, and a big, long table appeared to be set with vinegar bottle, and such as that, in the center of the table, and sugar-bowl.

Q. Do you know whether it is a public or private dining-room? [57]

A. I don't know; I never did see anyone eating in there; on my two occasions of visiting there I never did see anyone eating in that dining-room.

Q. And this kitchen you have described is right off the dining-room? A. Yes, sir.

Q. What did you do with the articles that you found there, Mr. Brown?

A. Took them up to the office of the chief of police, and sealed them up, and then handed them over to the chemist.

Q. Did you take them from the defendant's possession at that time? A. Yes, sir.

Q. Will you examine this bottle and its contents. (Hands to witness).

A. That is the label that I put on that bottle.

Q. Is that the bottle which you obtained from

(Testimony of H. P. Brown.)

the possession of the defendant? A. Yes, sir.

Q. How much liquid was in that bottle at that time?

A. Oh, probably a couple more inches that what is in it now.

Q. How much more would you say is in it now?

A. Half full.

Q. Did you make any examination of it at that time?

A. I didn't, no; just smelled it, that is all, at the time I found it.

Q. Now, you say you found what you thought was claret wine? A. Yes, sir.

Q. Will you examine this demijohn, please?
(Hands to witness.)

A. That is the demijohn that I found underneath the table.

Q. Was there any substance or liquid in it at that time? A. Yes, sir.

Q. Did you make an examination of it?

A. Just by smelling, is all.

Q. What did you determine? [58]

A. Claret wine, I should say it was.

Q. And both of these containers were turned over by you to Professor Dinsmore? A. Yes, sir.

Q. Were they in your custody from the time you seized them until you turned them over to Professor Dinsmore? A. Yes.

Q. Did you do anything to the substance contained in these two containers? A. I did not.

(Testimony of H. P. Brown.)

Mr. DISKIN.—We offer in evidence the bottle and its contents and the demijohn and its contents.

Mr. MOORE.—We object, if the Court please, on the grounds heretofore stated.

The COURT.—It will be the same ruling and same exception.

(The bottle is marked Plaintiff's Exhibit No. 1 and the demijohn, Plaintiff's Exhibit No. 2.)

Mr. DISKIN.—(Q.) What you have testified occurred where, Mr. Brown?

A. Occurred in Reno, Washoe County, Nevada.

Mr. DISKIN.—Cross-examine.

Cross-examination.

Mr. MOORE.—(Q.) What time in the day was it when you went there, Mr. Brown?

A. Seven o'clock in the evening.

Q. Was it dark at that time?

A. Yes, just getting dark.

Q. The 29th of December, it was after dark, was it not? A. Yes, just dark.

Q. Did you all go in the premises together?

A. Yes, sir.

Q. You and Mr. Nash and Mr. Sheehan?

A. Yes.

Q. All three of you Federal prohibition officers?

A. Yes, sir.

Q. Did you have a search-warrant with you at the time? [59] A. Mr. Nash did.

Q. You knew that fact? A. Yes, sir.

(Testimony of H. P. Brown.)

Q. Had you seen it? A. Yes, sir.

Q. And that was the only one that was in the party? A. Yes, sir.

Q. Now, how many rooms are there in that building there? A. In the whole building?

Q. No, on the ground floor, commencing with the front room that you say had a bar in it.

A. All I can testify is as to the bar-room, the dining-room and the kitchen.

Q. Isn't there a small room between the dining-room and the kitchen? A. A what?

Q. A small room; don't you go through two doors, that is, openings, from the dining-room, in going into the kitchen? Just to revive your recollection, when you come in from the dining-room toward the kitchen, don't you pass through a door, and then turn off to the left, and go through another doorway?

A. I believe there is a little hallway, a hallway that leads out to the doorway, to the door that we entered in the back of the premises.

Q. Now, you didn't see anyone in there before you entered the place, did you? A. No, sir.

Q. Nor see anything that was in there until after you entered the kitchen? A. No, sir.

Q. The kitchen had a stove in it? A. Yes, sir.

Q. And working boards and dishes, and general kitchen furniture, did it not? A. Yes.

Q. Whereabouts was it that you found the two

(Testimony of H. P. Brown.)

exhibits that have [60] been presented here, the bottle and the other container?

A. A table about the center of the kitchen, underneath the table.

Q. And these were standing underneath the table? A. Yes, sir.

Q. Where was the defendant?

A. The defendant was—like the table was sitting in the center of the room there, and the window was up here (indicating), he was up there putting a curtain up, standing on another table putting a curtain up at this window.

Q. When you entered there what did you do immediately?

A. We came in there, and as our warrant stated the goods would be found in the kitchen underneath the table, that would be my first place to look.

Q. You say your warrant stated that?

A. I think it did, underneath the table in the kitchen.

Q. Will you examine the warrant, and see if you find any such statement?

A. The affidavit, I think. Let me see the affidavit. (Examines affidavit.) Yes, it mentions the kitchen, that it was sold in the kitchen.

Q. Yes, but the affidavit itself does not mention where it could be found in the kitchen.

A. Oh, no, I said where it was sold.

Q. And when you went in the kitchen and saw

(Testimony of H. P. Brown.)

the defendant up at the window, what did you immediately do?

A. Mr. Nash immediately touched him on the leg, and informed him that he had a search-warrant.

Q. That he had a search-warrant?

A. When Mr. Nash said that I took the stuff from underneath the table.

Q. You were around at the other corner of the table by that time? [61]

A. I was there, when I first entered I stopped at the table.

Q. Is it not a fact you went around there and picked up the stuff before Mr. Nash had approached the defendant?

A. No, sir. No, sir, I looked under the table, but I didn't pick it up; I knew it was under the table before Mr. Nash served the warrant.

Q. How did you know it was there?

A. I saw it.

Q. You saw the bottle?

A. No, I stooped down and saw it underneath there.

Q. You could not tell what was in it, could you?

A. No, sir, I could not.

Mr. MOORE.—I think that is all.

Mr. DISKIN.—That is all, Mr. Brown.

Testimony of P. Nash, for the Government.

P. NASH, called as a witness on behalf of the Government, after being sworn, testified as follows:

Direct Examination by Mr. DISKIN.

Q. Mr. Nash, do you know the defendant in this case? A. I do.

Q. Do you know what business he was engaged in on the 29th of December of last year?

A. Soft drink.

Q. Where was his establishment?

A. Alpine Winery, directly across Center Street from the City Hall.

Q. Did you have occasion to enter his premises on the 29th of December, 1920? A. I did. [62]

Q. Who was with you?

A. Mr. Brown and Mr. Sheehan, both agents.

Q. Through what door did you enter?

A. We went in through the back door, entered into a little passageway, and turned to the right as we came in in this passageway, which brought us into either the dining-room, I think it was the dining-room, but close to the kitchen, then we went right through the next door into the kitchen, and the defendant was in there.

Q. What was the defendant doing—you mean Vachina?

Mr. MOORE.—I object to any testimony as to what the defendant was doing, or what this witness saw or did at that time, basing my objection on the grounds heretofore stated.

(Testimony of P. Nash.)

The COURT.—Same ruling and exception.

WITNESS.—The defendant was in the act—had his back turned to us—was in the act of raising a shade, or putting a shade up on the back window, some sort of a covering for the back window, and he didn't know we were in the building at all, I do not believe, until I touched him on the leg, I think it was, or some part of his body, and told him we had a warrant to make a search.

Mr. DISKIN.—(Q.) What did you do thereafter?

A. Took him across to the police station.

Q. What did you do in the building—did you look for anything more in the building?

A. Didn't look for any more than we found.

Q. I am trying to find out what you found.

A. Oh, yes. I had turned around, and the defendant had turned around, and Mr. Brown had these two containers of what proved to be liquor in one and wine in the other.

Q. Where were they found? [63]

A. Underneath this center table, I guess you would call it a center table; it had a rack on it, a long table in the center of the kitchen.

Q. Did you make any examination of the contents of the bottle at that time? A. Yes, sir.

Q. What examination did you make?

A. I tasted it.

Q. Are you familiar with the taste of alcohol?

A. Yes, sir.

Q. Can you say that the bottle contained alcohol?

A. I can. I would call it jackass brandy.

(Testimony of P. Nash.)

Q. How about the demijohn?

A. The demijohn had a good deal of wine, some sort of red wine in it.

Q. Will you describe the interior of the place to the Court and jury?

A. Entering from Center Street you come into the bar-room proper; there is a little office directly next to the Center Street end of the bar, but the doorway is to the right of the office going in; you pass through this bar-room, which is a long room with tables and chairs, then you go into a room which I presume had been a dining-room; at this time it was empty.

Q. Empty?

A. Yes, sir. I think there were tables there, but I didn't see any dishes or signs of being a dining-room, but from its appearance, I judge if this had been a restaurant this would have been the dining-room of the property; pass through it and into the kitchen, as I remember.

Q. Was the kitchen furnished?

A. Yes, sir, it had a stove in it.

Q. Anything else?

A. Chairs, sink, table; I didn't notice any supplies of any kind; we didn't make any search to speak of [64] at this time. My recollection is I saw some dishes there too.

Mr. DISKIN.—Cross-examine.

Cross-examination.

Mr. MOORE.—(Q.) You and all the party with you were Federal prohibition officers?

A. Yes, sir.

(Testimony of P. Nash.)

Q. And you were operating under the search-warrant which has been introduced in evidence here, were you?

Mr. DISKIN.—I don't know that it has been introduced in evidence.

Mr. MOORE.—Not introduced in evidence, no. It is in this case, I will show it to you. (Hands paper to witness.)

Mr. DISKIN.—We object to that, if your Honor please, as immaterial. I don't see the purpose of it. It has been determined it is a valid search-warrant.

The COURT.—I will sustain the objection.

Mr. MOORE.—We reserve an exception, if the Court please. There has been no answer. This search-warrant has not been introduced in evidence, but is a part of the records in this case. I think the question was objectionable, and if the Court will permit me I would like to ask another question.

The COURT.—Go on and ask what further questions you wish.

Mr. MOORE.—(Q.) I show you a document to which your name is attached, and has on the back of it, Reno, Nevada, December 30th, 1920, with a statement of what had been done over your name, having been issued, as it appears, on the 28th day of December, A. D. 1920. I will ask you to state if you had that document in your possession at the time you went there and entered the premises?

(Testimony of P. Nash.)

Mr. DISKIN.—That is objected to for the reason it is immaterial, not cross-examination, and cannot possibly determine any of the issues in this case.

Mr. MOORE.—I will state, if the Court please, that the question is propounded, as I take it, under the authority of the United States versus Amos, to which I have referred your Honor heretofore.

Mr. DISKIN.—I don't see how it is cross-examination.

The COURT.—It is not cross-examination. You can make him later your own witness.

Mr. MOORE.—Well, I will accept the ruling of the Court.

The COURT.—I will rule against it now on the ground it is not cross-examination. That is the only ground on which it is excluded at this time.

Mr. MOORE.—We reserve an exception, if the Court please.

Q. I believe you stated in your direct examination that when you entered the premises on that evening that the defendant—

The COURT.—Didn't he speak about that search-warrant on the direct examination?

Mr. DISKIN.—I think he did.

The COURT.—I will change that ruling. I withdraw that last ruling.

Mr. MOORE.—(Q.) Then I will ask you if that was the instrument you had in your possession on that night.

A. This document that is attached to these other two papers is the warrant.

(Testimony of P. Nash.)

Q. That is the warrant which you had? Did you have any other or different warrant than the one which you now hold in your hand and described as I have described it? [66]

A. I had a copy of this warrant; that is, I had the original and the copy.

Q. That is the original, is it not?

A. Judging from the looks of it, I should say it is a carbon copy, but it is apparently the one I used and retained as the original.

Q. It is the one upon which you made your return?

A. It is the one upon which I made my return.

Q. And which you treated as the original?

A. I did.

Q. What became of the copy?

A. Gave it to Vachina.

Q. And that is the only one which you had with you? A. At that time.

Q. Well, it was the only one under which you were acting at that time? A. Yes.

Q. Could you see from the outside of the building any of the things which you have described here?

A. Not from the outside of the building; no, sir.

Q. And you could not see them until you entered the kitchen? A. No.

Q. Could not see the demijohn or the bottle either?

A. No.

Mr. DISKIN.—That is objected to as not proper cross-examination and immaterial, not tending to prove any issue in this case. It is not insisted that

(Testimony of P. Nash.)

the officer went in there because he saw a crime committed, but because he was armed with a valid search-warrant.

The COURT.—Well, the answer is in, I will let it stand.

Mr. MOORE.—(Q.) What time of the evening was it when you went in there? A. Seven P. M.

[67]

Q. Dark at that time?

A. Well, I guess it was coming dark.

Q. 30th of December?

A. Yes; the street lights were on, as I remember.

Mr. MOORE.—I think that is all.

Mr. DISKIN.—That is all, Mr. Nash.

Mr. MOORE.—Now, if the Court please, I move the Court to strike from the record the testimony of Mr. Nash and of Mr. Brown relative to what they did on the evening as detailed by them; also all evidence as to what they found on that evening in the premises described by them, for the reason and on the grounds that it now appears from their testimony and the records of this court, that they were operating under a search-warrant which was invalid, it having been issued upon an affidavit, which affidavit was insufficient, and that their actions thereunder were in violation of the constitutional rights of the defendant, as provided by the Fourth Amendment of the Constitution; and that the introduction of such testimony is in violation of the constitutional rights of the defendant as provided un-

(Testimony of S. C. Dinsmore.)

der the Fifth Amendment to the Constitution.

The COURT.—It will be the same ruling and the same exception. [68]

Testimony of S. C. Dinsmore, for the Government.

S. C. DINSMORE, called as a witness on behalf of the Government, after being sworn, testified as follows:

Direct Examination by Mr. DISKIN.

Mr. DISKIN.—You admit the Professor's qualifications?

Mr. MOORE.—Oh, yes.

Mr. DISKIN.—(Q.) I hand you Plaintiff's Exhibit Number One; will you examine the same. (Hands to witness.) Can you identify that exhibit?

A. Yes, sir.

Q. When did you first see it?

A. I saw it on the evening of the 29th of December.

Q. Last year? A. Last year.

Q. In whose possession was it when you first saw it? A. Mr. Brown's.

Q. Did Mr. Brown at that time deliver it to you?

A. He did.

Q. Did you thereafter examine the contents of that bottle? A. I did.

Q. What did your examination disclose as to the alcoholic content of the same?

Mr. MOORE.—If the Court please, we object to the question on the grounds heretofore stated to the other question.

(Testimony of S. C. Dinsmore.)

The COURT.—The same ruling and exception.

Mr. MOORE.—And that it is incompetent, irrelevant and immaterial.

A. It showed an alcoholic content of 47.72 per cent.

Mr. DISKIN.—(Q.) From your analysis are you able to state whether or not the content of the bottle is fit for use as a beverage?

A. I would say that it was. [69]

Q. Will you examine this demijohn marked Plaintiff's Exhibit 2, did you ever see that demijohn before? A. Yes, sir.

Q. When did you see it first?

A. At the same time that this Exhibit Number One was delivered to me.

Q. From whom did you receive that Exhibit Number Two? A. Mr. Brown.

Q. At the same time? A. At the same time.

Q. Did you make any examination of the content of Exhibit Two? A. I did.

Q. What kind of an examination did you make, Professor?

A. I made determination for percentage of alcohol.

Q. And what did your examination disclose?

A. It showed it carried alcohol of 12.4 per cent.

Q. From the examination and analysis you made, can you state whether or not the content of the demijohn is fit for use as a beverage? A. It was.

Mr. DISKIN.—That is all.

Mr. MOORE.—No questions.

Mr. DISKIN.—That is our case.

Mr. MOORE.—That is our case. [70]

After argument to the jury by counsel for the Government, the Court instructs the jury as follows:

Instructions of Court to the Jury.

The COURT.—Gentlemen, I do not think it is necessary for me to say anything; still in every case of this sort the defendant has certain rights which ought to be mentioned.

The only charge is that the defendant had intoxicating liquor in his possession at the time alleged in the indictment. If that liquor was fit for a beverage, and contained one-half of one per cent, or more, of alcohol by volume, it was the sort of liquid which is prohibited by the statute, and the possession of which is made an offense. The statute declares that it is a violation of the law, and it is unlawful for one to have in his possession intoxicating liquor containing one-half of one per centum, or more, of alcohol by volume, and suitable for a beverage.

There is a provision in the statute to the effect that one may have in his possession in his dwelling-house for his own use and the use of his family, and for the use of his bona fide guests, intoxicating liquor, provided he acquired it lawfully. If he acquired the liquor and had it in his house at the time or prior to the time when the Volstead Act went into effect, then his possession would not be unlawful under the statute. But a possession in a bar-room or a hotel is not in a private dwelling-house,

and therefore is forbidden by the statute. The burden is on the defendant to show that the liquor was acquired by him lawfully, and if he fails to do so, the law presumes that it is an unlawful holding. When the possession of the liquor [71] is once shown, the law also presumes that it is for the purpose of barter and sale, unless the contrary is shown by the defendant, though the presumption is only a *prima facie* presumption, and may be overthrown by testimony on the part of the defendant.

The fact that the defendant has not testified here cannot be thrown in the balance against him. He is entitled under the law to wait until his guilt is proven beyond a reasonable doubt before he appears upon the stand; and his guilt must be shown beyond a reasonable doubt before you can find a verdict of guilty. A reasonable doubt is a substantial doubt; it must be such a doubt as would govern you in the more weighty affairs of life.

It takes twelve of your number to find a verdict. When you have agreed upon a verdict, you will notify the marshal and you will be brought into court. Is there anything further, Gentlemen?

Mr. MOORE.—Nothing further. [72]

**Certificate of Reporter U. S. District Court to
Transcript of Testimony and Proceedings.**

I, A. F. Torreyson, Reporter in the United States District Court for the District of Nevada, DO
HEREBY CERTIFY:

That as such reporter I took *verbatim* shorthand notes of the testimony and proceedings in said

court on the trial of the case of United States of America, Plaintiff, vs. E. Vachina, Defendant, on May 7th, 1921 and that the foregoing pages from 1 to 19, both inclusive, contain a full, true and correct transcript of my shorthand notes of the testimony given and proceedings had on said trial.

Dated May 23d, 1921.

A. F. TORREYSON.

[Endorsed]: In the District Court of the United States, in and for the District of Nevada. Honorable E. S. Farrington, Judge. United States of America, Plaintiff, vs. E. Vachina, Defendant. No. 5396. Transcript of Testimony. Appearances: Mr. M. A. Diskin, Assistant United States Attorney, for Plaintiff. Messrs. Moore & McIntosh, for Defendant.

WITNESSES:

	Direct	Cross
Brown, H. P.	3	6
Nash, P.	9	12
Dinsmore, S. C.	16	

Filed May 24, 1921. E. O. Patterson, Clerk.

[73]

In the District Court of the United States for the District of Nevada.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Nevada,—ss.

I, E. O. Patterson, Clerk of the District Court

of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case of United States of America, Plaintiff, vs. E. Vachina, Defendant, said case being No. 5396 on the docket of said court.

I further certify that the attached transcript, consisting of 75 typewritten pages numbered from 1 to 75, inclusive, contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein together with the endorsements of filing thereon, as set forth in the praecipe filed in said case and made a part of the transcript attached hereto, as the same appears from the originals of record and on file in my office as such clerk in the City of Carson, State and District aforesaid.

I further certify that the cost for preparing and certifying to said record, amounting to \$17.45, has been paid to me by Mr. M. B. Moore, attorney for the defendant in the above-entitled cause. [74]

And I further certify that the original writ of error and the original citation, issued in this cause, are hereto attached.

WITNESS my hand and the seal of said United States District Court this 22d day of July, A. D. 1921.

[Seal] E. O. PATTERSON,
Clerk, U. S. District Court, District of Nevada.

**Letter of U. S. District Attorney Wm. Woodburn'
to Hon. E. S. Farrington.**

Time and Place of Holding Court: At Carson City
—First Mondays in February, May and Octo-
ber.

**DEPARTMENT OF JUSTICE.
OFFICE OF THE UNITED STATES
ATTORNEY.
DISTRICT OF NEVADA.**

Sept. 23, 1921.

Honorable E. S. Farrington,
U. S. District Judge,
Carson City, Nevada.

My dear Judge Farrington:

Referring to your letter of the 13th inst., you are advised that it is agreeable to me that you certify the bill of exceptions in the cases of the United States vs. Vachina and United States vs. Bachenberg.

As to the trial of Davis during the latter part of this month it is impossible, so far as my engagements are concerned, to arrange.

I expect to be in Carson in a day or two and will consult with you in reference to this matter.

Very sincerely yours,

WM. WOODBURN.

W: W.

[Endorsed]: Filed Sept. 27, 1921. E. O. Pat-
terson, Clerk, U. S. Dist. Court, Dist., Nevada. By
_____, Deputy Clerk. [76]

In the District Court of the United States, in and
for the District of Nevada.

INDICTMENT FOR VIOLATION OF NA-
TIONAL PROHIBITION ACT.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

E. VACHINA,
Defendant.

United States of America,
District of Nevada,—ss.

Certificate of Judge to Bill of Exceptions.

The foregoing was prepared and submitted to me as a Bill of Exceptions by the defendant Sept. 13th, 1921, and I do now, in pursuance of the foregoing consent of Wm. Woodburn, U. S. District Attorney for the District of Nevada, certify that it is full, true and correct, and has been settled and allowed and is made a part of the record in this cause.

Done in open court this 27th day of September, 1921.

E. S. FARRINGTON,
Judge. [77]

In the District Court of the United States for the
District of Nevada.

**Certificate of Clerk U. S. District Court to Tran-
script of Record.**

United States of America,
District of Nevada,—ss.

I, E. O. Patterson, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case of United States of America, Plaintiff, vs. E. Vachina, Defendant, said Case being No. 5396 on the docket of said court.

I further certify that the attached transcript, consisting of 79 typewritten pages numbered from 1 to 79 inclusive, contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein, together with the endorsements of filing thereon, as set forth in the praecipe filed in said case and made a part of the transcript attached hereto, as the same appears from the originals of record and on file in my office as such clerk in the City of Carson, State and District aforesaid.

I further certify that the cost for preparing and certifying to said record, amounting to \$18.70, has been paid to me by Mr. M. B. Moore, attorney for the defendant in the above-entitled cause. [78]

And I further certify that the original writ of

error, and the original citation, issued in this cause are hereto attached.

WITNESS my hand and the seal of said United States District Court this 27th day of September, A. D. 1921.

[Seal] E. O. PATTERSON,
Clerk, U. S. District Court, District of Nevada.

[79]

In the United States District Court for the District
of Nevada.

No. 5396.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. VACHINA,

Defendant.

Citation on Writ of Error (Original).

The United States of America,—ss.

The President of the United States to the United
States of America, GREETING:

To the United States of America:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, within thirty days from the date of this writ, pursuant to a writ of error duly allowed by the District Court of the United States in and for the District of Nevada and filed in the Clerk's office of said court on the

27th day of May, A. D. 1921, in a cause wherein E. Vachina is appellant and you are appellee, to show cause, if any, why the judgment and decree against the said appellant as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the party in that behalf.

WITNESS the Honorable E. S. FARRINGTON, Judge of the District Court of the United States, in and for the District of Nevada, this 27th day of May, A. D. 1921, and of the Independence of the United States, the one hundred and forty-fifth.

E. S. FARRINGTON,

District Judge. [80]

[Seal]

Attest: E. O. PATTERSON,

Clerk.

By _____,

Deputy.

Service of the within citation and receipt of a copy is hereby admitted this 27th day of May, A. D. 1921.

WM. WOODBURN,

U. S. Attorney, District of Nevada. [81]

[Endorsed]: No. 5396. In the United States District Court for the District of Nevada. United States of America, Plaintiff, vs. E. Vachina, Defendant. Citation. Filed May 27th, 1921. E. O. Patterson, Clerk.

In the United States District Court for the District
of Nevada.

No. 5396.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. VACHINA,

Defendant.

Writ of Error (Original).

The United States of America,—ss.

The President of the United States, to the Honorable The Judge of the District Court of the United States of America, in and for the District of Nevada, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, wherein the United States is plaintiff and E. Vachina is defendant, a manifest error hath happened, to the great damage of the said E. Vachina as by the indictment in said cause and the record of proceedings therein appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning

the same, to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, together with this writ, so that you have the same in the said [83] United States Circuit Court of Appeals at San Francisco, California, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable E. S. FARRINGTON, Judge of the said United States District Court of the District of Nevada, the 27th day of May, in the year of our Lord one thousand nine hundred and twenty-one.

E. O. PATTERSON,

Clerk of the United States District Court for the District of Nevada.

Allowed by:

E. S. FARRINGTON. [84]

[Endorsed]: No. 5396. In the United States District Court for the District of Nevada. United States of America, Plaintiff, vs. E. Vachina, Defendant. Writ of Error. Filed May 27, 1921. E. O. Patterson, Clerk.

[Endorsed]: No. 3722. United States Circuit Court of Appeals for the Ninth Circuit. E. Vachina, Plaintiff in Error, vs. The United States of

America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Nevada.

Filed July 23, 1921.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

